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No. 94-1039

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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BRIEF AMICUS CURIAE OF THE FAMILY RESEARCH COUNCIL IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE FAMILY RESEARCH COUNCIL IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The Family Research Council is a national organization founded in 1981. It is an independent, non-profit, advocacy organization dedicated to ensuring that the interests of the family are considered and respected in the formation of public policy. The Council works to create in the Legislative, Executive and Judicial branches of the federal government an understanding of pro-family issues.

Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

The Colorado Supreme Court has pronounced public policy. In so doing, the court created a public policy antagonistic to the proper role of the respective branches of government, and one which results in extraordinary judicial intrusion on the social functions of democracy.

The court's holding, that the people of Colorado may not amend their constitution to preclude laws that support homosexuals as a protected class, was predicated on the establishment of a new fundamental right, the "right to participate equally in the political process."

Nevertheless, despite the court's delineation of this new right, in practical terms, the case below has little to do with the political process. Rather, it has everything to do with the people of Colorado's expression of their consensus on the matter of homosexuality.

In reality, the practical policy announced by the court was this: if the people of Colorado desire that their laws affirmatively support homosexuality, that is allowed. But, precedent and history aside, in Colorado, homosexuality cannot be the subject of negative public regulation, even regulation by omission.

In effect, the court below provided homosexuals with "easy money"—a new constitutional right—with which to buy a result they manifestly did not earn in the marketplace of ideas. This new right allows homosexuals to circumvent the process of obtaining a consensus for their ideas in that marketplace of ideas. Moreover, it allows homosexuals to insulate their ideas from that market's ebb and flow. Indeed, no matter what ideas homosexuals advance, the people of Colorado never can use the ballot box affirmatively to reject those ideas.

Thus, the ruling below, seen as broad public policy as well as constitutional interpretation, represents tremendous change in the functioning of our democracy. The people, demonstrably and correctly, are not at all sanguine about such judicial activism, and no doubt they will bring to the Court's attention the many compelling legal arguments that debunk the decision below.

Nevertheless, the fact remains that, with or without legal portfolio, the Colorado Supreme Court has pronounced public policy and, clearly, when courts do legislate, there are factors that portend either success or failure. Therefore, in addition to close legal analysis on the substance of that court's decision, it is appropriate forthrightly to inquire whether the court has made *good* public policy. That is, beyond the invitation to exercise sweeping legislative power that is the salient issue in this case, the Court should be instructed by the indicia of public policy consequences that accompany the establishment of a new "right to participate equally in the political process."

The public policy issues inherent in the legal analysis below, in particular, the judicial exercise of sweeping legislative power in an area that involves quintessential moral questions, raise a specter that is familiar to this Court and the nation. Indeed, for predicting the public policy consequences of the decision below, there exists nowhere a more graphic or poignant object lesson than the holding and historical impact of *Roe v. Wade*, 410 U.S. 113 (1973).

Regardless of various views on abortion itself, it is plain that no other decision so gravely has impacted the fabric of the social contract of our Republic, and the legitimacy of the judiciary, as *Roe*. Today the Court is invited to repeat *Roe's* judicial overreaching by again imposing its moral judgment through the establishment of a new fundamental right that is textually flimsy and conceptually sheer.

This result must be avoided, and the object lesson of *Roe*, and its social, political, and jurisprudential ramifications, demonstrates why. The historical context for the decision, the effect on the legitimacy and independence of the judiciary, the mechanism for enforcing social change, the prominence of the moral dynamic—on every relevant point, our nation's experience with *Roe* counsels the greatest caution in allowing the analysis of the court below to stand.

Roe established a new fundamental right, the right to privacy. It also strictly limited the power of the states to regulate abortion. Likewise, the Colorado Supreme Court has established a new fundamental right, the right to "equal" political participation. It also strictly limited the power of the state to regulate homosexuality. Moreover, just as the *Roe* analysis has not been confined to abortion, *see, e.g., Compassion in Dying v. State of Washington*, No. 94-35534, slip op. (9th Cir. 1995) (1995 U.S. App. LEXIS 4589), the analysis in the instant case must extend to any group disadvantaged by legislation.

In both cases, but especially now with the benefit of more than twenty years of hindsight, the indicia of public policy disaster are clear. Thus, to preserve the proper functioning of government, including the legitimacy and independence of this Court, the present invitation to repeat *Roe's* judicial overreaching by again imposing the Court's moral judgment through the creation of a new fundamental right must be declined.

ARGUMENT

I. THE HISTORICAL CONTEXT STRONGLY COUNSELS AGAINST CREATING A NEW FUNDAMENTAL RIGHT THAT PRECLUDES THE PEOPLE FROM EXPRESSING THEIR CONSENSUS ON HOMOSEXUALITY.

Homosexuality is a lively topic in America's marketplace of ideas. Much of this social dialogue is framed in legislation. Many states have organizations that participate in this debate, both for and against homosexuality.[1] In 1992, Oregon and Colorado had ballot initiatives regarding homosexuality. *Anti-gay Rights Ballot Initiatives*, Boston Sunday Globe, Nov. 28, 1993, at 20. In 1993, 19 local ordinances similar to Amendment 2 were approved by voters. *Gay Rights Advocates Brace for Ballot Fights*, New York Times, Nov. 12, 1994, at A17. In 1994, eight states, a record number, had such initiatives underway. *Id.*

At the local level in 1993, voters in Cincinnati, Ohio and Lewiston, Maine followed the example of voters in Tampa, Florida and Irvine, California, and repealed existing laws prohibiting discrimination based on sexual orientation. *Gays Lose in Three City Ballot Initiatives*, Washington Blade, Nov. 5, 1993, at A1; Melissa Wells-Petry,

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[1] Examples of local groups that oppose legal condonation of homosexuality are: ***Alaska***, Evangelical Pastors' Task Force of Anchorage; ***California***, Traditional Values Coalition; ***Florida***, American Family Political Committee of Florida; ***Hawaii***, Ohana Policy Center; ***Idaho***, Idaho Citizens Alliance; ***Kentucky***, Family Foundation; ***Michigan***, Michigan Family Forum; ***Minnesota***, Minnesota Family Council; ***Mississippi***, American Family Association; ***Missouri***, Family Watch, Inc., Missouri Amendment Coalition; ***New Mexico***, New Mexico Boys Ranch, Inc.; ***Ohio***, American Heritage Coalition, Take Back Cincinnati, Citizens for Community Values; ***Oregon***, Oregon Citizens Alliance; ***Pennsylvania***, Straight Americans Military, Inc.; ***Virginia***, Christian Coalition; ***Washington***, Citizens Alliance of Washington, Youth Action Coalition. Files of the Family Research Council.

Exclusion 175 (1993); *Irvine's Human Rights Ordinance*, Los Angeles Times, Oct. 28, 1989, at B12. That same year, in Portsmouth, New Hampshire, by a 2-1 margin, voters rejected the call for an ordinance giving special protection to homosexuality. *Washington Blade* at A1.

In 1993 in New York City, the chancellor of public schools was fired because parents objected to curricula that advocated homosexuality. *NYC's Controversial Schools Chancellor Ousted*, Washington Post, Feb. 11, 1993, at A3. When, in 1993, the President announced his initiative to open the armed forces to homosexuals, lawmakers received a tremendous outpouring of public opinion, resulting in congressional codification of the military's policy excluding homosexuals from service. 10 U.S.C. § 654. Indeed, though a matter of legislative debate for many years, the Congress repeatedly has declined to accord special status to homosexuality. *See Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *cert. den'd*, 471 U.S. 1017 (1985).

Clearly, the court below was not stepping into a public policy or public opinion vacuum on homosexuality. Indeed, the historical context for the ruling below—dynamic social debate and widespread legislative expressions on homosexuality—is strikingly similar to the context in which *Roe v. Wade* was decided.

After the Civil War, abortion statutes began to replace the common law. The statutory law almost universally made abortion a felony subject to severe punishment. In the "century between 1850 and 1950 . . . practically every American and European jurisdiction [banned] abortion unless necessary to save the life of the mother." Robert H. Birkby, *The Court and Public Policy* 382 (1983).

By 1972, fourteen American states had liberalized the otherwise complete ban on non-therapeutic abortion,

though no jurisdiction in America or Europe had come close to enacting the liberal access to abortion that would follow *Roe*. *Id*. In each case, the liberalization had come through deliberation in the legislative process, not through judicial intervention.

In this modest change among 14 states, some perceived a permissive, and, it must have been assumed, massive and permanent shift in societal attitudes toward abortion. Indeed, Justice Blackmun began the majority opinion in *Roe* by citing the *attitudinal changes in society* as the moving force behind the Court's analysis. *Roe*, 410 U.S. at 113.

As it turned out, however, this perceived attitudinal change, the very ground that allegedly substituted for the lack of a textually coherent basis or judicial precedent, was neither massive, permanent, nor—apart from the institutional norm of *stare decisis*—able to sustain the Court's foray into major policymaking.

Thus, from the historical context alone, it is self-evident why *Roe* routinely is rated as "the most raw exercise of judicial power since *Dred Scott* . . . [a decision even] very activist legal commentators who admired and defended the Warren Court balked as defending . . . ." Christopher Wolfe, *The Rise of Modern Judicial Review*, at 307 (1994). Simply put, many social observers, irrespective of views on abortion, have concluded that the "country would have been far better off had the Supreme Court in *Roe* stayed its hand and permitted the people of the states to decide abortion policy." *See, e.g.*, Terry Eastland, *Shameless in Seattle*, American Spectator, July 1994, at 58.

Moreover, *Roe* is not the only instance of a perception of public opinion, or of what public opinion ought to be, leading the Court into holdings that subsequently disrupted the social process and fell into disrepute. Another example is the Court's and the nation's experience, with the death penalty cases.

In its early analysis, the Court viewed the Cruel and Unusual Punishment clause as a provision that "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States,* 217 U.S. 349, 378 (1910). Then the Court found the clause derives "its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 100-101 (1958). Finally, in 1972, the Court pronounced that society had evolved to the point where capital punishment was no longer acceptable. *Furman v. Georgia,* 408 U.S. 238 (1972).

The historical context? One commentator observes that the Court's dramatic outlawing of capital punishment was accomplished "despite the fact that 39 states plus the District of Columbia had the death penalty . . . . [I]n the wake of *Furman,* 35 states reenacted capital punishment statutes in an effort to retain the penalty within the somewhat obscure guidelines established by the Court. . . . In addition, California voters by referendum effectively overturned a state court decision abolishing the death penalty." *Birkby* at 239-40.

In short, the Court in *Furman,* as in *Roe,* strayed from a strict constitutional analysis, relied on public opinion and relied wrongly. By 1976, the Court's read on public morality was repudiated completely and the death penalty was reinstituted. *Gregg v. Georgia,* 428 U.S. 153 (1976); *Woodson v. North Carolina,* 428 U.S. 280 (1976).

Plainly, the Madisonian dilemma of determining when the majority is, in fact, tyrannizing the minority is not resolved by reading the public's tea leaves, whether through informal surmisals of public opinion, as the Court engaged in in *Roe,* or through the ultimate public opinion poll, a ballot initiative such as Amendment 2. Neither is self-justifying. Rather, the dispositive factor, in constitutional, but ultimately also in public policy analysis, is the existence of an enumerated, or at least textually

and historically recognizable, fundamental right. In practical terms, the more clearly the people are expressing themselves on a matter, the more explicit the constitutional counterpoint should be if it is said to form the basis for judicial imposition of broad public policy.

No such constitutional counterpoint exists to justify overriding the clearly expressed will of the people of Colorado. Homosexuality, in Colorado and across the nation, is the subject of a momentous social debate. History, as well as the law, proves it is not only proper, but prudent that this debate be allowed to run its course, democratically and without unwarranted dictation from the judicial branch. *Cf.* William A. Henry III, *Pride and Prejudice,* Time, June 27, 1994, at 58 ("a gay-rights bill was enacted in 1989 after 17 years of legislative debate").

Clearly, it is a perilous task for the Court to usurp the legislature as the vehicle for expressing the people's moral consensus on matters "having little or no cognizable roots in the language or design of the Constitution," or matters which are not " 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty. . . .' " *Bowers v. Hardwick,* 478 U.S. 186, 194-95 (1986). Without the guiding light of enumerated constitutional rights, there is serious risk that the resulting jurisprudence will leave the public square in disarray and the Court in dishonor.

II. THE POTENTIAL IMPACT ON THE LEGITIMACY OF THE COURT STRONGLY COUNSELS AGAINST CREATING A NEW FUNDAMENTAL RIGHT THAT PRECLUDES THE PEOPLE FROM EXPRESSING THEIR CONSENSUS ON HOMOSEXUALITY.

As abortion and capital punishment were milestones for the Court in decades past, homosexuality is the issue of the moment. Regardless of the language of rights and political participation and redress, clearly the case below chiefly is about homosexuality.

The people of Colorado, by exercising their constitutional rights, have expressed their consensus on homosexuality. And, while surely the Court can claim expertise on learned constitutional matters, the plain fact of the matter is that the public cannot be convinced that the Court knows more than the people of Colorado about the proper response to homosexuality in that state. This credibility gap, which relates directly to the perception of the Court's legitimacy, is even wider when the mechanism for overcoming the people's common sense on a moral matter is the discovery of a new fundamental right.

Indeed, it was the "discovery" of rights that brought *Roe* into disrepute. The right to abortion was not found through a straightforward reading of the Constitution or careful inquiry into history or our concept of ordered liberty. Rather, this right appeared through labyrinthine theorizing that, despite judicial efforts to make the best of it, is still roundly criticized from all corners as essentially anti-intellectual.

It is just such overreaching that sows the harsh and tenacious seed of discredit when the judiciary, *under cover of a new fundamental right,* ventures into areas such as whether abortion is right or wrong, capital punishment good or bad, and, here, whether homosexuality should be encouraged or discouraged by the law. In such areas, which are characterized by a quintessential moral choice, questions about the Court's legitimacy when it forecloses political choice are inescapable.

Without doubt, *Roe* is the paradigm of the social division and disruption in representative government that results when the judiciary forecloses political choice. It is axiomatic that creating more and more "rights" exempts more and more subjects from democratic control. Thus, democracy, and the social contract, or, as Thomas Sowell denominates it, the common moral universe,

shrink. As democracy shrinks, so do its institutions. Ironically, this shrinkage is notable first in the diminished legitimacy of this Court.

Plainly, the "enormous controversy over [*Roe*] raised the question of [the Court's] legitimacy very strongly." *Wolfe* at ix. At *Roe's* entry, for example, only 14 states had moved toward modest liberalization of access to abortion. But immediately after *Roe,* "[41] abortion statutes, most of them intended to confine or circumvent *Roe,* were adopted in 1974 alone, 15 in 1975, and 23 in 1976. . . . By the mid-1980's, only nine states and the District of Columbia were authorizing the use of public funds to pay for abortions other than those necessary to save the life of the mother." *Birkby* at 386. Indeed, "[*Roe*] led to substantial nationwide attacks on the Court's power." *Wolfe* at 307.

Time has not healed this social wound; in fact, time has only exacerbated the frustration that ideas that advance anything less than abortion on demand are, by judicial fiat, outside the realm of political choice. Most strikingly, more than two decades after the Court announced the right to abortion, the federal government deemed it necessary to enact a statute to respond to public reaction to *Roe.* In what might be seen as a sort of judicial nemesis, the legislation begat by *Roe,* the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, with some of the severest punishments ever seen for social protest, itself arguably is unconstitutional. *See United States v. Wilson,* No. 94-CR-140, slip op. (E.D. Wis. Mar. 16, 1995); *but see United States v. Brock,* No. 94-CR-86, slip op. (E.D. Wis. Sep. 23, 1994).

Nevertheless, even among those with differing views on abortion, there is consensus that much of the social division and political disruption that followed *Roe* would not have occurred had the decision been on firm constitutional or statutory ground, and had it not overturned existing laws on abortion in all fifty states. *Cf. Hardwick,*

478 U.S. at 194-95 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution").

The analogy of the instant case to *Roe*, and its impact on the legitimacy of the Court, is unavoidable. The right discovered by the Colorado Supreme Court has *no* firm grounding in the Constitution. It emerges only by ignoring clear precedent of this Court. It survives only by overturning positive law enacted by the people of Colorado. It precludes political choice, and it sharpens the politicization of judging.

First, there simply is no support in law or logic for the notion that a legislative choice that disfavors a group, *that is not a suspect class and is, in fact, politically powerful, Evans v. Romer*, Nos. 94SA48 & 94SA128, slip op. at n.3 (Colorado Oct. 11, 1994); *id.* at n.1 (Erickson, J., dissenting), unconstitutionally "fences" that group out of the political process. *Id.* at 1.

Secondly, the court below ignores, because it has no power to overturn, this Court's jurisprudence that "has essentially frozen the list of 'fundamental' interests." Geoffrey Stone, et al., *Constitutional Law*, at 831 (1986). This freeze is based on the well-founded and well-delineated reluctance to create new right—rights which, in addition to shrinking democracy, implicitly, but inexorably, engage the Court in further social engineering. *See, e.g., Wolfe* at 258 ("The Warren Court . . . expanded the category of 'fundamental rights' dramatically and undertook to establish broad social policy"); *Hardwick*, 478 U.S. at 194-95. Such social engineering by the judiciary is not only wrong as a matter of constitutional law, it is wrong-headed as a matter of public policy. Only the legislature is assigned the agility needed to re-engineer society constantly.

Moreover, for the decision below to survive and become the law of the land, it must overturn Amendment

2, a measure adopted by 813,966 Coloradans acting in self-government and surely due a strong measure of judicial deference. It also must overturn, or preclude, the laws of every town, city, and county, as well as state-wide laws, that do or would prohibit recognition of homosexuals as a protected class.

Finally, in practical terms, the establishment of the right to equal participation in the political process has all the hallmarks of a new, additional litmus test for judicial appointment, thus threatening to escalate at least the appearance of political judging. Indeed, once an advocacy group is able to persuade the judiciary to impose what no elected legislature would enact, the Faustian deal is on. By definition, continued viability of the new "right" depends wholly on the Court. Thus, most of the group's energy and efforts are focused on the political sympathies of the justices and the political resolve of the judiciary's gatekeepers.

As clearly demonstrated in our nation's experience with *Roe*, because the Court precluded any effective public policy choice on the issue, those who support abortion and those who do not must be forgiven for concluding the entire Republic falls or stands on the views of each justice, or that collective moral judgments always are hostage to potential judicial mischief. This highly politicized judicial climate cannot, and does not, foster the appearance of the Court as a legitimate, independent, impartial branch of government.

Plainly, the result in the instant case cannot undo the obvious public policy legacy of *Roe*. *But the Court can avoid repeating and exacerbating the public policy mistakes that have harmed the reputation of the law*. Clearly, this Court must decline to tell the people of Colorado, or any other state, that they are forbidden from expressing in law their social and moral consensus on homosexuality.

III. THE MECHANISM THE COURT BELOW USED TO ENFORCE SOCIAL CHANGE, ESTABLISHMENT OF A NEW FUNDAMENTAL RIGHT, STRONGLY COUNSELS AGAINST A RULING THAT PRECLUDES THE PEOPLE FROM EXPRESSING THEIR CONSENSUS ON HOMOSEXUALITY.

This discussion began with the observation that the court below had pronounced public policy. As noted above, the court provided homosexuals with "easy money" —a new constitutional right—with which to buy a result they manifestly did not earn in the marketplace of ideas.

Again *Roe* is instructive. While the court in the instant case did not go so far as to use the word "penumbra," it followed a similar analysis in discovering a right to participate equally in the political process.

In a dissent that foreshadowed what would occur in *Roe*, in *Griswold v. Connecticut*, Justice Black cogently observed:

> One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible or more or less restricted in meaning. *This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures."* . . . I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some special constitutional guarantee.

Griswold, 381 U.S. 479, 509-10 (1965) (Black, J., dissenting) [emphasis added].

This method was employed deftly by the court below, and this "fact is well illustrated by the use of the term ['right to participate equally in the political process'] as a comprehensive substitute for the ['right to vote']." *Id.* The result was both to dilute and to expand that right, *depending on how one intended to vote.*

Over 1,524,000 Coloradans exercised their right to vote on Amendment 2. But in a sort of constitutional shell game, the court below substituted for the right to vote a more comprehensive right for those who support homosexuality and a severely restricted right for those who do not support homosexuality.[2] Those in Colorado, 813,966 at last count, who oppose special recognition of homosexuality have *no* effective political forum open to them. Political choice is truncated, in real terms, forever.

Indeed, even if the people of Colorado prevailed upon Congress to enact the provisions of Amendment 2, following the analysis below, the law could not stand. As significant, if the court has discovered a new fundamental right, perforce everyone must have it. In effect, as *Roe* did on abortion, the Court today is invited to set national policy on homosexuality.

The mechanism for enforcing this policy—establishment of a new fundamental right—greatly increases the scope of social engineering, if not outright social disruption, that inheres in the lower court's opinion. Inescapably similar to *Roe*, the opinion below proceeds completely to obstruct the contemporary consensus on homosexuality, as well as the legitimate role of the people in self-government. This effort must fail.

First, while declining to bootstrap homosexuals into the classical civil rights framework of suspect classifications, nevertheless the court accorded homosexuals the protec-

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[2] On first blush, the ruling below seems to prohibit only laws that preclude homosexuals from enacting laws in their favor. But the court also implicitly found that the "right to participate equally" was burdened if homosexuals were forced to participate at the *same level*—here, state-wide—*or higher, i.e.*, at the national level. Thus, *no* unfavorable law on homosexuality could withstand the court's analysis. Even if a town, with no subordinate jurisdictions, enacted Amendment 2-type provisions, homosexuals could obtain a law in their favor only by political action at the town level or higher. Under the ruling below, this would be an impermissible burden on homosexuals' right to participate in the political process.

tions of a special class. Indeed, ironically the court bestowed on homosexuals the very privileges the people of Colorado sought to stay. *Evans*, slip op. at 1 (Erickson, J., dissenting).

Secondly, since the court clearly departed from the settled suspect classifications—indeed, the court explicitly ruled that homosexuals are *not* a suspect class—there is no principled way to confine this right to equal participation in the political process to advocates of homosexuality. Quite contrary to the interpretive principle of neutral application, by untethering itself from traditional equal protection analysis, the court below demonstrated graphically that:

> 'Situational ethics' and other intellectual fads, together with a cheap glorification of gross violations of social norms, are steadily eroding the moral standards of the society. Moreover, the idea that these moral norms apply ultimately to everyone . . . is being destroyed by a new surge of tribalism that says *it all depends on whose ox is being gored.*

Thomas Sowell, *Race and a Lost Moral Universe*, Washington Times, Sept. 13, 1994 [emphasis added].

Gone are the criteria that, to be afforded the protections of heightened scrutiny for legislative classifications, a group must "1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group, and 3) show that they are a minority or politically powerless. . . ." *High Tech Gays v. DISCO*, 895 F.2d 563, 573 (9th Cir. 1990).

Under the analysis below, all that need be done is to collapse the distinction between equal protection claims based on suspect classes and those based on fundamental rights, denominate the special privileges of a suspect class as a new, free-standing fundamental right, and award said right to various groups, *depending on whose ox is being gored.*

In other words, the court below availed itself of "[o]ne of the most effective ways of diluting or expanding a constitutionally guaranteed right." *Griswold*, 381 U.S. at 509. It created a more comprehensive right (the right to participate equally in the political process) as a substitute for an established right (the right to vote)—and then doled out this new right according to the content of one's vote. In so doing, it employed the last resort of a court bent on social change—the discovery of a new fundamental right. *Cf. Hardwick*, 478 U.S. at 194-95.

IV. THE PROMINENCE OF THE MORAL DYNAMIC IN THE QUESTION BEFORE THE COURT STRONGLY COUNSELS AGAINST CREATING A NEW FUNDAMENTAL RIGHT THAT PRECLUDES THE PEOPLE'S EXPRESSION OF THEIR CONSENSUS ON HOMOSEXUALITY.

Even before *Roe v. Wade*, a prescient district court identified the fact that would make the Court's incursion into abortion policymaking the most flammable issue in our society. This fact is that in abortion, as in homosexuality, "every argument starts from and returns to an ethical or religious assumption." *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689, 709 (1967).

Nevertheless, the moral dynamic of abortion perhaps was the part of the social equation given shortest shrift in *Roe*. Certainly, that is true regarding Amendment 2. It does not appear that the Court foresaw how deeply *Roe* would embroil the moral soul of the nation. Likewise with homosexuality, the temptation for those in favor of homosexuality is to dismiss the importance, indeed the enduring power, of the moral dynamic. In fact, the court below went so far as to find that "antidiscrimination laws [and presumably anti-antidiscrimination laws] make no assumptions about the morality of [homosexuality]." *Evans*, slip op. at 25.

One homosexual advocacy group, for example, has the slogan: *"we're here, we're queer, get over it."* As the

history of public reaction to *Roe* demonstrates, however, people do not "get over" moral principles. In fact, if *Roe* is any indication, allegiance to personal moral principles may solidify in the face of a judicial fiat to "get over it." Certainly social mores change and change again, but this is precisely why reflecting such change is a legislative, not judicial, function. For practical as well as constitutional reasons, such changes "must arrive through the *moral choices of the people and their elected representatives*, not through . . . this court." *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) [emphasis added].

Denying or dismissing the moral dynamic of homosexuality is not new, even though the law always has recognized that it "should . . . be flexible enough to recognize the moral dimension of man and his instincts concerning that which is honorable, decent, and right." *Parker v. Levy*, 417 U.S. 733, 765 (1974). One judge concluded, for example, "[it is] of *no significance* that the [homosexual] conduct in question may be condemned as immoral by a majority in our society." *Miller v. Rumsfeld*, 647 F.2d 80, 86 (9th Cir. 1981) (Norris, J., dissenting) [emphasis added].

This seems a bold conclusion indeed, yet the court below implicitly employed such reasoning. Plainly, in the pursuit of result-oriented jurisprudence that favors homosexuals, such courts, as the Court of Appeals for the District of Columbia Circuit recently observed, in fact are in "rebellion." *Steffan v. Perry*, No. 91-5409, slip op. at 18 (D.C. Cir. Nov. 22, 1994).

It is not too strong to say that such courts, including the lower one in this case, are in rebellion not only against precedent—for example, the clear theme that the law "is constantly based on notions of morality," *Hardwick*, 478 U.S. at 195—they also are in rebellion against the legitimate expression of the legitimate will of the people.

Indeed, as one commentator on the law has observed, "[d]issatisfaction with the Constitution—either because its prescriptions are wrong, or, more often, *because they do not go far enough*—is at the heart of the development of modern constitutional interpretation and judicial review." *Wolfe* at 205 [emphasis added]. Even more to the point, a "moment's reflection suggests . . . that Supreme Court departures from the original meaning of the Constitution are advocated *precisely because* those departures are not correctable democratically. The point of the academic exercise is to be free of democracy in order to impose the values of an elite upon the rest of us." Robert H. Bork, *The Case Against Political Judging*, National Review, Dec. 8, 1989, at 24.

In the instant case, rebellion is the only term that describes accurately the lower court's approach to the people's democratically-expressed consensus on homosexuality. First, the court denied that Amendment 2 even had a moral dynamic. *See Evans*, slip op. at 25 & 26. It then held, in the alternative, that Amendment 2 was neither necessary to, nor effective in, promoting public morals. *Id.* at 25.

The court's first premise, that Amendment 2 had no moral dynamic, flatly was contradicted by the uncontroverted evidence of the people, as well as by common sense. Clearly, Amendment 2 does not *require* discrimination against homosexuals. Rather, it simply allows each individual to act according to his own deeply held moral and religious values on an issue that conspicuously engages "a millennia of moral teaching." *Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring). In political context, Amendment 2 was a clear statement by the people of Colorado that they did not consider it wise to start down the road toward affirmative action for homosexuals.

Thus, judicial overreaching is demonstrated amply below. In dismissing the moral dynamic of Amendment 2,

the court opined: "In short, prohibitions on discrimination against gay men, lesbians, and bisexuals do not imply an endorsement of any particular sexual orientation or practices." *Evans*, slip op. at 26.

The people simply do not agree, and the court's reasoning is no more persuasive than concluding *Roe* does not imply endorsement of abortion. This hypertechnical notion may have commerce in the courtroom, but most assuredly this is not how the American people, whether for or against homosexuality, or for or against abortion, understand Amendment 2 or *Roe v. Wade*. *See, e.g.*, Phil McCombs, *Remembering Thomas*, Washington Post, Feb. 3, 1995, at D5 (discussing the impact of the judiciary's "A-OK" on abortion).

Moreover, hypertechnicality reigns in the court's discussion as to whether morality, if it is even implicated, is a "compelling" or "substantial" government interest. It is unimaginable that a court could be unaware of the omnipresent theme of morality in every current debate on American public policy, across the board, much less in regard to a subject that engages a millennia of moral teaching. What is plain, however, is that, contrary to the explicit holding of this Court, the court below used "the Fourteenth Amendment [to give themselves] power to impose upon the [State] their view of what constitutes wise . . . social policy." *Dallas v. Stanglin*, 490 U.S. 19, 27 (1989).

Indeed, Amendment 2 is a vivid case in point: the moral choice posed by Amendment 2 certainly was compelling and substantial to the 1,524,117 citizens of Colorado who used the ballot box to express their views—in the end, their views of what is right and what is wrong. This is no petty exercise. As distinguished scholars have concluded, "it is not too much to say that civilization itself depends on the making of . . . distinctions (between, finally, right and wrong)." Richard John Neuhaus, *Morality and Homosexuality*, Wall Street Journal, Feb. 24, 1994, at A18. And in political terms, *what is at stake here is nothing less than, "What is the actual —and the desirable—distribution of political power [among the three coordinate branches of government] in the United States?"* *Wolfe* at 11.

This momentous social process must not be shortchanged by unwarranted judicial intervention. The consequences are plain. Far from the people shutting out homosexuals from the political process, it is the people of Colorado who are shut out by the court's ruling. Where can the people go for redress? To whom can they complain that they are not heard? At what level of political expression can they voice their consensus?

The object lesson of *Roe* looms; for in that case, as in the instant one, for all practical purposes, the public debate is being pushed from the statehouse and onto the streets.

CONCLUSION

Certainly the people of Colorado do not acquiesce in the legislative activity of their state's supreme court. Nor are they alone in their common sense that an issue that conspicuously engages a millennia of moral teaching is amenable perfectly to the process of our social contract.

The instant judicial initiative to foreclose political choice on how the people of Colorado respond to the issue of homosexuality is not only wrong at law, but wrong-headed as a matter of public policy. Such foreclosure serves only to shrink democracy, diminish our common moral universe, and obviate altogether the need for civil discourse. Thus, in a Pyrrhic victory, judicial foreclosure of public policy choices the Constitution rightly left to the people often works to disadvantage the very groups or ideas that were the object of judicial protection. Moreover, the damage to the process and orderly function of our social contract is inestimable.

For the foregoing reasons and authorities, Amicus requests that the decisions by the Supreme Court of Colorado in *Evans I* and *II* be reversed.

Respectfully submitted,

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